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No. 144

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

WILLIAM L. HEAD and
JESSE M. CUMMINGS ..... Petitioners

vs.

THE STATE OF MISSISSIPPI ..... Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOE T. PATTERSON, Attorney General
New Capitol Building
Jackson, Mississippi

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THE STATE OF MISSISSIPPI — Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Petitioners were convicted in the Circuit Court of Forrest County, Mississippi for the unlawful possession of burglary tools. Their conviction was affirmed by the Supreme Court of Mississippi. A copy of the Mississippi Supreme Court's opinion is made a part of the petition herein. Petitioners' case was a companion to Smith vs. State, 128 So. 2d 857. Under circumstances described in the petition herein and much more particularly in the trial transcript and opinions in both cases, after a wild chase through dense traffic at dangerous rates of speed, the car operated by Smith, and in which petitioners were passengers, was stopped by the Forrest County Sheriff and a member of the Mississippi Highway Patrol, whose aid had been requested by the Sheriff. The conviction of Smith was reversed and he was discharged by the Mississippi Supreme Court by a 6-3 majority which

held that the Sheriff had no legal right to initiate the chase of the Smith car under the particular circumstances and that, consequently, the fruits of the subsequent search of the car could not be constitutionally used against Smith. This decision was predicated, not upon Federal Constitutional grounds, but as a violation of Section 23, Mississippi Constitution, 1890, which guarantees that "The people shall be secure in their persons, houses, and possessions, from unreasonable * * * search; * * *."

It has long been the rule in Mississippi that only the owner or one in rightful possession of property (including automobiles) could invoke the Constitutional safeguard and it was that rule as had been announced in, among other cases, Rose vs. State, (Miss.) 76 So. 2d 835, upon which the Mississippi Supreme Court affirmed the separate conviction of petitioners.

Petitioners herein rely primarily for relief on Jones vs. U. S., 362 U.S. 257, 80 Sp. Ct. 725, 4 L. Ed. 2d 697, 78 A.L.R. 2d 233, and similar cases in support of the rule announced therein, as well as Mapp vs. Ohio, 367 U.S. 643, 81 Sp. Ct. 1684, 6 L. Ed. 2d 1081, rehearing den., 82 Sp. Ct. 23. Mississippi has no argument with Mapp vs. Ohio since for many years Mississippi has vigorously adhered to the exclusionary rule of evidence under its own Constitution.

Nor does the State of Mississippi take issue with the soundness of Jones vs. U. S. Had the Mississippi Supreme Court ever had the argument made to it that was made to this Court in Jones vs. U. S., no doubt it would have long since adopted the same rule. It goes without saying that in cases involving unlawful possession of various types of contraband, a person cannot very well be in actual or constructive possession of something in

the trunk of a car without having such a possessory interest in that car as to be protected by both the Mississippi and United States Constitutions. However, no such argument was made in the case at bar to the Mississippi Court but only objections general in their nature were made without reference in the trial Court to either the State or United States Constitutions.

Without regard to the Constitutional questions raised, it also goes without saying that, a fortiori, if petitioners had their possessory interest protected by the Constitutions, the trial Court reached the right result in finding them equally guilty with Smith of the unlawful possession of the burglary tools.

Petitioners argue that their Constitutional rights have been violated in that (1) they were unlawfully arrested by a State officer; (2) an illegal search and seizure was made of the automobile in which they were passengers; and (3) they were convicted of unlawfully, knowingly and feloniously having in their possession the fruits of the unlawful search and seizure.

It is respectfully submitted that the points are not well taken for two reasons: First, the Constitution of the United States was not invoked either in the trial Court or in the State Supreme Court and; Second, the question of the legality of the arrest of petitioners, while raised in the State Court, was not decided or discussed by the State Supreme Court.

As an aid to the Court in consideration of these matters, there are appendicized hereto the Assignment of Errors, Brief of Appellants, Brief of Appellee and Suggestion of Error filed in the Mississippi Supreme Court and upon which the opinion of that Court was predicated. Nowhere in these pleadings and arguments will this Court

find that the Constitution of the United States was invoked. Only the Constitution of the State of Mississippi was invoked by reference in appellants' brief to Smith vs. State (appellants' brief - Page 4). Nor was the United States Constitution invoked on suggestion of error after affirmance in the State Court. This Court should be interested to know that Earle Wingo, who represented both Smith and petitioners in their trials and appeals, certainly knew what he was doing and how he wished to handle the appeals. Until his death a short while ago Mr. Wingo was considered the outstanding criminal lawyer in Mississippi, a former President of the Mississippi State Bar Association and author of "Mississippi Criminal Law and Procedure" (1951). After appealing petitioners' conviction Mr. Wingo became ill and, upon affirmance, the suggestion of error was prepared and presented to the Supreme Court of Mississippi by Mr. Lawrence Arrington, a former District Attorney and also considered one of the ablest criminal lawyers in the State. Thus, this Court should readily accept the proposition that the failure to specifically invoke the pertinent provisions of the United States Constitution was consciously done and not the result of ineptness or inexperience of counsel.

NO PROVISION OF UNITED STATES CONSTITUTION INVOKED IN STATE COURTS

In Levy vs. Superior Court (1897), 167 U.S. 175, 42 L. Ed. 126, 17 Sp. Ct. 769, this Court held that where a State statute was attacked in the State Court only on the ground of its repugnancy to the Constitution of the State and it was not claimed there that it was repugnant to the Constitution of the United States, this Court was without jurisdiction to review.

Bearing in mind that there was only one general reference to constitutionality in the case at bar either at the trial or in the State Supreme Court and this reference could only have been to the Constitution of Mississippi since the only authority cited, Smith vs. State, was decided under the State Constitution, the Constitution of the United States was not invoked. Porter vs. Foley, 24 How. 415, 16 L. Ed. 740. See, also, Miller vs. Cornwall R.R. Co., 18 Sp. Ct. 34, 168 U.S. 131, 42 L. Ed. 409.

"Something more than this vague and inferential suggestion of a right under the Constitution of the United States must be presented to the State Courts to give us the limited authority to review their judgments which exists under the Constitution and is regulated by . . . (28 USCA, Section 1257). A mere claim in the Court below that there has been a denial of due process of law does not of itself raise a Federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the 14th Amendment of the Constitution." Thomas vs. Iowa, 28 Sp. Ct. 487, 209 U.S. 258, 52 L. Ed. 782.

The clause in the Constitution or the law of Congress under which the right, title, etc., is claimed, must be specified by the petitioners, and it is not enough to show that a Federal question might have arisen in and been applicable to the case. In that class of cases of which this is one, wherein a right, title, privilege, or immunity is claimed under the United States, it is required that such right or privilege be "specially set up and claimed." Harding vs. Illinois, 196 U.S. 78, 49 L. Ed. 394, 25 Sp. Ct. 176. Other cases supporting this situation are legion. Annotation 84 L. Ed. 925, et seq. Annotation Note 223, 28 USCA, Section 1257.

The United States Constitution not having been invoked until the filing of this petition for certiorari, it is too late. Spies vs. Illinois, 8 Sp. Ct. 21, 123 U.S. 131, 31 L. Ed. 80; Worthy vs. Moore County, 9 Wall. 611, 19 L. Ed. 565, and a multitude of other similar authorities under Note 219 to 28 USCA, Section 1257.

THE STATE SUPREME COURT HAD AN ALTERNATE GROUND OF AFFIRMANCE

For the sake of brevity, the argument of the State of Mississippi in connection with the arrest of petitioners (Appendix - Brief of Appellee, pgs. 4 & 5) is not reiterated. On appeal in State Court one issue was the legality of the arrest of petitioners. It is regrettable that the Mississippi Supreme Court pretermitted the question of the legality of the arrest of petitioners. It was content to rest its affirmance on the ground hereinabove discussed. Nevertheless, if the arrest of petitioners was legal and on a ground other than that for which Berry Smith, Jr. was arrested then, the officers had a right to search the car as an incident to the arrest of petitioners. In the absence of an applicable Federal statute (there is none here) the law of Mississippi determines the validity of an arrest therein. United States vs. Di Re, 332 U.S. 581, 92 L. Ed. 210. Therefore, since the Supreme Court of Mississippi, in the absence of an argument predicated on Jones vs. United States, could have predicated its affirmance on the legality of the arrest of petitioners, the United States Supreme Court is without jurisdiction to review its judgment. Ellis vs. Dixon, 349 U.S. 458, 75 Sp. Ct. 850, 99 L. Ed. 1231; Stembridge vs. Georgia, 343 U.S. 541, 72 Sp. Ct. 834, 96 L. Ed. 1130; Durley vs. Mayo, 351 U.S. 277, 76 Sp. Ct. 806, 100 L. Ed. 1178; Buck vs. California, 343 U.S. 99, 72 Sp. Ct. 502, 96 L. Ed. 775.

CONCLUSION

Wherefore, it is respectfully submitted that this case should not be reviewed by this Court for the reason that, first, the Federal Constitutional ground relied on was not raised in either the trial Court or the State Supreme Court and, second, the State Supreme Court could just as well have predicated its affirmance on the legality of the arrest of petitioners.

Respectfully submitted,

STATE OF MISSISSIPPI
BY JOE T. PATTERSON, Attorney General

By G. Garland Lyell Jr.

G. Garland Lyell, Jr.
Assistant Attorney General

CERTIFICATE

I, G. Garland Lyell, Jr., Assistant Attorney General of the State of Mississippi, hereby certify that on the 21st day of November, 1962, I served one copy of the foregoing brief on the Attorney for petitioners herein, Honorable Douglas C. Stone, Post Office Box 166, Columbus, Mississippi, by depositing same in a duly addressed envelope with postage prepaid in the mail box in the Capitol Building in the City of Jackson, Mississippi.

G. Garland Lyell Jr.
Assistant Attorney General.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DECEMBER TERM, 1961

No. 41,948

WILLIAM L. HEAD and
J. M. CUMMINGS ..... Appellants

vs.

STATE OF MISSISSIPPI ..... Appellee

ASSIGNMENT OF ERRORS

Now come the appellants, William L. Head and J. M. Cummings, and respectfully assign the following errors committed upon the trial of the above styled and numbered cause, and assign the following:

1. The court erred in granting to the State Instruction No. 1, found in the record at page 24.

2. The court erred in overruling the objection of the appellants to the testimony of Sheriff Waller, on direct examination, with reference to the search of the vehicle, after having placed the appellants in jail and returning to the vehicle to search it. (R. p. 74)

3. The court erred in declining to sustain the objection of the appellants to the testimony of the sheriff with reference to items taken from the automobile, in which the appellants were passengers. (R. p. 76)

4. The court committed error in overruling the objection of the appellants to the testimony shown in the record at pages 79 and 80.

4. The court further committed error in overruling the objection of the appellants to the testimony of the sheriff on direct examination with reference to objects found along the highway, because they could not be identified as having been objects thrown from the car. (R. p. 89)

5. The court committed error in permitting the sheriff to testify on direct examination that there were safes in Forrest County equipped with gas, over the objection of the appellants. (R. p. 99)

6. The testimony of the sheriff, on cross-examination, reveals that the arrest of the appellants was without authority of law, because the sheriff testified that at the time he began to pursue the vehicle none of the parties in the vehicle were committing a crime in his presence. (R. p. 107)

7. The court committed error in overruling the motion of the appellants to exclude the testimony of the sheriff, who testified that he arrested the two appellants after the vehicle had stopped and placed them in a common jail, and about 45 minutes later went to the car and searched the same and obtained the articles testified to, and the record shows that the appellants had committed no crime whatever but were merely occupants of the car of Mr. Berry.

8. The court committed error in not permitting the Highway Patrolman Puckett, on cross-examination, to state why the appellants were being arrested.

9. The court committed serious error in overruling the motion of the appellants to exclude the items found on the highway, because they had not been identified as

having come from the vehicle in which the appellants were occupants. (R. p. 131)

Respectfully submitted,
/s/ Earle L. Wingo
Attorney for Appellants

CERTIFICATE

I, Earle L. Wingo, hereby certify that I have this date mailed, postage prepaid, the original of the above assignment of errors to Honorable Tom Q. Ellis, Clerk of the Supreme Court, of the State of Mississippi, at his office in Jackson, Mississippi; and that I mailed a correct copy of the above assignment of errors to Honorable Joe Patterson, Attorney General, of the State of Mississippi, at his office in Jackson, Mississippi.

Witness my signature this the 16 day of November, A.D., 1961.

/s/ Earle L. Wingo
Attorney

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DECEMBER TERM, 1961

No. 41,948

WILLIAM L. HEAD and
J. M. CUMMINGS — Appellants

vs.

STATE OF MISSISSIPPI — Appellee

BRIEF OF APPELLANTS

PRELIMINARY STATEMENT

The appellants, William L. Head and Jesse M. Cummings, when indicted in the Circuit Court of Forrest County, Mississippi for the possession of burglary tools, were tried jointly, convicted and sentenced to serve a term of five years in the State Penitentiary.

STATEMENT OF FACTS

At the outset we remind this Honorable Court that the appellants were in the company of one Berry Smith, Jr., who was convicted in the Circuit Court of Forrest County, Mississippi for the possession of burglary tools and sentenced to serve five years in the penitentiary, and on appeal the case was reversed and the appellant discharged. This case is reported in 128 So. (2d) 857, and being Supreme Court Case No. 41,889.

The appellants were passengers in an automobile operated by one Berry Smith, Jr., and on the night of August 29, 1960, the Sheriff of Forrest County, Bob Waller, testi-

fied that he saw Berry Smith, Jr. near the airport in Forrest County driving his automobile about 10 miles per hour, and that he turned around back toward the car of the appellant and that the driver, Berry Smith, Jr., motioned for him to come up to the side of the car, which he did, and that the sheriff leaned over to tell Berry Smith to pull over to check his driver's license but the appellant took off in a cloud of black smoke, and that he immediately began to pursue the automobile. (R. p. 49) That they did not violate the speed law until about ten seconds later, when the sheriff was already in pursuit of the vehicle. (R. p. 103)

The sheriff was in his private automobile, with no symbol of any kind to indicate that he was an officer of the law. (R. p. 102)

After the driver of the car was finally stopped by the sheriff and a highway patrolman, the sheriff arrested not only the driver of the car but the two appellants, Head and Cummings, and took all three parties to the jail in Forrest County, and sometime later went back out to the automobile and searched the same and found, what they claimed to be burglary tools.

The alleged burglary tools were found in the back-end of the automobile near the spare tire, and there was also located three suit-cases, and all of the alleged burglary tools were in the back-end of the car and had no connection with the suit-cases.

ARGUMENT

The first assignment of error relates to the granting of Instruction No. 1 to the State, found in the record at page 24. The serious objection to this instruction is that the jury was told that if they believed from the evidence

in this case beyond a reasonable doubt that the appellants carried concealed about their *persons*, or in their *baggage*, implements, tools, or instruments, peculiarly adapted to aid in the commission of burglary, then you are instructed that this is prima facie evidence of intention to use them for such purposes.

The proof clearly shows that there were no burglary tools, or instruments, peculiarly adapted to aid in the commission of burglary, carried concealed about their persons of these appellants or in their baggage.

Section 2044 of the Mississippi Code of 1942, as amended, does provide that:

"The carrying concealed about one's person, or anyone's baggage, implements, tools, or instruments, peculiarly adapted to aid the commission of burglary, larceny, or robbery, shall be prima facie evidence of intention to use them for such purpose."

It was prejudicial error for the court to permit the State to obtain a prima facie instruction in face of the absence of testimony supporting the wording of the statute, and that is that they had no burglary tools, or instruments, peculiarly adapted to aid the commission of burglary, larceny, or robbery, concealed about their person nor in their baggage. The proof clearly shows that this just was not true.

We submit to the court that, with reference to the second assignment of error, the sheriff had no right to arrest the appellants because up to that time they had violated no law in the presence of the sheriff, and they should not have been taken to jail, and, therefore, their arrest was without authority of law and wholly illegal, and any articles taken from the car in which they were a

passenger, would be inadmissible because of said illegal arrest.

At page 73 of the record, we find the testimony of Bob Waller on direct examination, who said he put these two appellants under arrest and brought them to the Forrest County jail, after having locked Berry Smith's car and leaving it near the highway, and then went back and unlocked the car and searched it without a search warrant.

We next complain of the court's error in declining to sustain the objection of the appellants to the testimony of the sheriff with reference to the items taken from the automobile, in which the appellants were passengers, for the reason it was an unlawful arrest and unlawful pursuit, and everything done by the sheriff and highway patrolman were illegal and unlawful in violation of the Constitutional rights of these appellants. *Berry Smith, Jr. v. State of Miss.*, 128 So. (2d) 857.

Next, error committed by the court was in overruling the objection of the appellants to the testimony of the sheriff on direct examination, at pages 79 and 80, wherein it was sought to introduce a pair of gloves found on the highway, because the sheriff nor anyone else could identify them as the objects that came from the car. This was highly prejudicial.

We next complain of the court in overruling the objection of the appellants to the testimony of the sheriff on direct examination with reference to a man's cap that was found on the highway, because it could not be shown that the cap came from the car. (R. pp. 88, 89)

We next complain of the error of the court in permitting the sheriff to testify, over the objection of the appellants, that there were safes in Forrest County equipped with gas. (R. p. 99) This was highly prejudicial.

We next complain of the unlawful arrest of the appellants, because the sheriff testified that at the time he began to pursue the vehicle, none of the parties in the vehicle were committing a crime, in his presence, and he had no search warrant for the vehicle, and he had no knowledge that whiskey was being transported therein. (R. p. 107)

We next complain of the error of the court in overruling the motion of the appellants to exclude the testimony of the sheriff, who testified that he arrested these two appellants after the vehicle was stopped and had placed them in a common jail, and forty-five minutes later went to the car and searched the same and obtained the articles testified to.

The court further committed error in not permitting the highway patrolman, Puckett, on cross-examination, to respond to the question of counsel for the appellants as to why they were being arrested. Certainly, under the law, they had a right to know for what they were being arrested, and the statute requires them to be informed of the reason for the arrest, but the learned Court sustained the objection to this inquiry. (R. p. 129)

We complained of the error of the court in overruling the motion of the appellants to exclude the items found on the highway because they had not been identified as having come from the vehicle in which the appellants were occupants. (R. p. 131) It will be further noted that the prosecution undertook to introduce a pair of gloves found on the highway by highway patrolman Puckett, and on cross-examination he was asked,

"Q. Could you tell the court whether those gloves came out of that car?"

"A. No, sir.

"Q. You could not, could you?

"A. No, sir.

"Q. And with reference to the cap that was found on the highway, you couldn't tell the gentlemen of the jury that the cap came out of that car, could you?

"A. No, sir. I couldn't swear to it." (R. pp. 126-127)

We cite the case of *Jack Newton v. The State*, 98 So. (2d) 116, decided November 18, 1957, wherein the defendant was convicted of possession of burglary tools, articles and instruments, the Supreme Court, Chief Justice McGehee, held that there was no evidence on which the case could have been submitted to jury, except upon instruction directing verdict in defendant's favor.

The court further stated that:

> "In prosecution for possession of burglary tools, articles and instruments found in trunk of automobile which was owned by another and in which defendant was riding at time of his arrest, evidence showed that owner had had complete control and possession of automobile, and that contents therein belonged to him, and did not sustain conviction."

In this case there was a reversal and the appellant discharged.

We also cite the case of *Berry Smith, Jr. v. State*, 128 So. (2d) 857.

It is earnestly submitted that because of the many errors committed by the lower trial court, the rights of the appellants were highly prejudiced and they were denied their constitutional right to a fair and impartial trial, and that this court should be its solemn opinion

reverse the judgment of conviction and discharge the appellants.

Respectfully submitted,
/s/ Earle L. Wingo
Attorney for Appellants

CERTIFICATE

I, Earle L. Wingo, attorney for appellants, hereby certify that the original of the above brief of appellants was this date mailed, postage prepaid, to Honorable Tom Q. Ellis, Clerk of the Supreme Court of the State of Mississippi, at his office in Jackson, Mississippi, and that a copy was mailed, postage prepaid, to Honorable Joe T. Patterson, Attorney General, at his office in Jackson, Mississippi.

Witness my signature this the 16 day of November, A.D., 1961.

/s/ Earle L. Wingo
Attorney

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SEPTEMBER, 1961 TERM

No. 4948

WILLIAM L. HEAD and
J. M. CUMMINGS — Appellants

vs.

STATE OF MISSISSIPPI — Appellee

BRIEF OF APPELLEE

PRELIMINARY STATEMENT

Appellants were jointly indicted with Berry Smith, Jr. for possession of burglary tools. After severance granted, Smith was separately tried, convicted and sentenced to the Penitentiary. Smith appealed his conviction and in *Smith v. State*, 128 So. 2d 857 his conviction was reversed and he was discharged here. Appellants were then tried together, convicted and sentenced to serve terms of five years in the State Penitentiary, from which conviction and judgment they appeal.

STATEMENT OF FACTS

The facts in this case are, of course, identical with those in Smith v. State, supra, except as those facts apply to the different situation that these appellants find themselves in.

About eight-thirty or nine o'clock at night near the airport gate southeast of the City of Hattiesburg, Sheriff Bob Waller was patroling in an unmarked car at about

ten or fifteen miles an hour when he met a Chevrolet Impala traveling at a very slow rate of speed in the opposite direction. The Sheriff passed the Chevrolet, turned around and came up behind it. The driver of the Chevrolet motioned the Sheriff to come up beside his car. The Sheriff pulled up beside the stopped Chevrolet and rolled his window down. When the driver of the Chevrolet saw that it was the Sheriff he drove away rapidly. As the Sheriff described it in the case at bar the car occupied by appellants "scratched" out and at the Smith trial, "took off in a cloud of smoke." The Sheriff sounded his siren and immediately pursued the Chevrolet. Within ten seconds the Chevrolet was exceeding the speed limit. The Sheriff followed the Chevrolet through traffic onto the Highway 49 Bypass, with which this court is certainly familiar, passed stop signs at an unlawful rate of speed, committed several extremely dangerous maneuvers in weaving and speeding through traffic, ultimately reaching speeds in excess of 110 miles per hour. The Sheriff radioed for help and Patrolman Puckett happened to be in the vicinity and joined the chase. After the lengthy chase up the Highway 49 Bypass, the Chevrolet driver obviously realized he could not outrun the pursuing vehicles and pulled over on the side of the road. The Sheriff pulled up in front of the Chevrolet and the Patrolman pulled up in the rear. The Patrolman arrested the driver, Berry Smith, Jr., and the Sheriff arrested the other two occupants.

The record in this case discloses that during this chase up Highway 49 Bypass, several articles were thrown out of the windows on the right hand side of the Chevrolet. One of these appellants was sitting in the front seat on the righthand side and the other appellant was sitting in the rear. Subsequent search along the road

shoulder resulted in the finding of gloves and a cap, while a short while thereafter a college student who was on the road attempting to hitchhike a ride to Jackson found a pistol which obviously had been in the grass only a short while and which was a perfect fit in a holster which was found in the Smith car when searched. In addition to this holster, which was a shoulder holster, other gloves, a .45 calibre revolver (loaded) and an assortment of tools, established to be burglars' tools, and other paraphenalia were found. The most interesting item was a gas mask and it was shown by the Sheriff that there were several safes in the Hattiesburg vicinity which were equipped to eject a disabling gas when the safe was tampered with. Additionally, in the trunk of the car were found three suitcases containing clothes, money wrappers, money, and other articles.

Neither of appellants testified nor did they offer any witnesses in their behalf.

ARGUMENT

POINT I

THE COURT DID NOT ERR IN GRANTING TO THE STATE INSTRUCTION NO. 1 (R. 24).

This point is not well taken for two reasons. First, even though there may not have been any evidence with respect to the finding of any of the tools or implements concealed about the person or luggage of the appellants, rather than prejudice the appellants, this instruction would have put an additional burden on the State. Furthermore, unquestionably the jury was warranted in inferring from the evidence that one or both of these appellants had at least one of the items of evidence on his person at least during a part of the wild chase.

Otherwise, why would appellants have thrown the articles out of the car window to the side of the road.

Secondly, practically every judicial definition of the word "baggage" which this writer has been able to find justify this instruction on the ground the "baggage" is not merely the suitcase or other container commonly used by travelers in carrying their belongings, but the word refers to the belongings themselves. The term "baggage" has been held to include tools used in a trade and usually carried about by the owner from place to place in his trunk; razors and other tools of a barber, carpenters tools carried in a trunk with the owners clothing, and in one case the term was held to include a "rifle, revolver, two gold chains, two gold rings, and silver pencil case" belonging to a fashionable gentleman traveling for pleasure and amusement. The court is referred to the scores of judicial definitions of this term beginning at *Page* 19 *of Words and Phrases, Permanent Edition, Volume* 5.

POINT II

THE LOWER COURT DID NOT ERR IN OVERRULING THE OBJECTION OF THE APPELLANTS TO THE TESTIMONY OF SHERIFF WALLER ON THE GROUND THAT APPELLANTS HAD VIOLATED NO LAW IN THE PRESENCE OF THE SHERIFF.

This Honorable Court will note that, while the testimony shows that Patrolman Puckett arrested the driver of the car, Berry Smith, the Sheriff himself arrested the two appellants. Nowhere in this record is it shown on what charge the Sheriff arrested these two men. Counsel for appellant asked the Sheriff "Why" you arrested these two men and the Sheriff gave as his reason that

they had participated in this wild ride, but in spite of the vigorous cross-examination, appellants' counsel did not ask what charge was made. Therefore, the record is silent as to what these men were charged with and it must be presumed that they were charged with some crime committed in the Sheriff's presence. The testimony clearly shows that several articles were hurled out of the windows on the right hand side of the car and onto the highway or the right-of-way. This is a violation of Section 2214.5 of the Mississippi Code of 1942, Recompiled, or if the articles which the officers saw thrown out on the highway should not be held classified so as to fall within the condemnation of this statute, the Sheriff was certainly warranted in thinking so.

At any rate, this record is silent and it must be assumed by this court that something in the conduct of these appellants entitled the Sheriff to make the arrest. When the Smith car was halted, they could have used abusive language authorizing arrest, among other things.

POINT III

THE LOWER COURT DID NOT ERR IN OVERRULING THE OBJECTION OF THE APPELLANTS TO THE TESTIMONY OF THE SHERIFF WITH REFERENCE TO ITEMS TAKEN FROM THE AUTOMOBILE IN WHICH THE APPELLANTS WERE PASSENGERS.

Hereunder, appellant relies on *Smith v. State*, supra, the companion suit to this case. However, the law of that case is not applicable here. Berry Smith, Jr. was the driver of the car and this court must have presumed in the Smith case that he was either the owner or in rightful possession thereof. Neither of the present appel-

lants can make the same objection. One of these appellants was in the front seat on the right side and the other of these appellants was in the back seat. Thus, we have the identical situation as confronted this court in *Rose v. State*, 76 So. 2d 835, 222 Miss. 699, from which the following quotation should be sufficient:

> "On the night after the robbery officers stopped an automobile which was being driven by Ballow and in which Wood, Scott and Rose were also riding. In the car the officers found pistols and a rope which the evidence shows was used in the robbery. Proof was made of that on the trial of this appellant. Rose says it was error to make that proof because the officer had no warrant to search the car. The contention is not well taken. In addition to the fact that the automobile was exceeding the speed limit, in the presence of the officers, it is shown that Rose did not own, or claim to own, the automobile, nor did he claim to be in possession thereof, rightfully or otherwise. The car was being driven by Ballow, and Rose was on the back seat. It was licensed in the name of a Mrs. Stevens. To be in position to complain of an illegal search one must be either the owner or in the rightful possession of the property searched."

Thus, has this court precluded this question against these appellants.

POINT IV

THE LOWER COURT DID NOT ERR WITH RESPECT TO THE ADMISSION IN EVIDENCE OF A PAIR OF GLOVES AND A MANS CAP FOUND ON THE HIGHWAY.

The record (182) shows that at the conclusion of the evidence in this case the trial judge, on motion of appel-

lant counsel, excluded from consideration by the jury the gloves and the cap. Therefore, appellants cannot complain.

It is the position of the State that the trial court did err, but erred in excluding the gloves and the cap. The testimony in a case of this kind should be full and complete. In the absence of a confession, the State can only prove possession of burglars tools by circumstances. The court will note the attire of these parties at the time apprehended. They were clad in dark clothing and soft soled shoes and it is important to note that everything they had was calculated to make them hard to see in dark or semi-dark conditions. The use of gloves to avoid leaving fingerprints was explained by the prosecution witnesses. Great latitude is allowed in the reception of circumstantial evidence. *Underhill's Criminal Evidence, 5th Edition, Herrick, Section* 18. There can be no question but that certain articles were thrown from the right hand window or winglows of the Smith car. The record shows that a search was made along the highway with the result that the gloves, the cap and later the pistol were found. Of course, no one could say positively that these were the same articles hurled from the car, but with the wide latitude allowed the trial court, it would be within his discretion to permit the admission in evidence of these articles. The only argument could be the remoteness of the finding of the articles but this is another question left to the discretion of the trial judge and his decision thereon is not to be reversed in the absence of clear proof of an abuse of that discretion and in all circumstances the interval of time between the commsision of an offense and the event to which the offered evidence relates is a factor for the jury to consider in determining

the weight or probative value of the evidence. *Wharton's Criminal Evidence, 12th Edition, Anderson, Section* 149.

Further as to the admissibility of the articles found along the highway, see *Underhill's Criminal Evidence, 5th Edition, Herrick, Section* 116; *Section* 633, *Note* 80; *Section* 872.

POINT V

THE COURT DID NOT ERR IN PERMITTING THE SHERIFF TO TESTIFY WITH RESPECT TO GAS EQUIPPED SAFES IN FORREST COUNTY.

Appellants cite no authority in connection with this contention. It is submitted that in a case of this kind where tools, appliances, and equipment must be established by the State as being, not those of a legitimate carpenter, plumber, electrician, etc., but must show that they are peculiarly adapted to burglary, it was not only competent, but it was necessary, to explain to the court and to the jury the unique use of a gas mask as a device adapted to burglary. Thus, the court very properly allowed the Sheriff to testify that there were safes in the vicinity, and particularly in the vicinity of the point of contact of the Sheriff with appellants, which were equipped with a type of disabling gas which would be discharged when a safe was tampered with. This is cogent evidence that a gas mask is a burglars device, at least in the Hattiesburg and Forrest County area.

POINT VI

AS TO THE LEGALITY OF THE ARREST BY THE SHERIFF.

Hereunder the argument is repeated that the Sheriff had no right to arrest the appellants because at the time

he began to pursue the vehicle none of the parties in the vehicle were committing a crime in his presence. There is nothing in this record to indicate that anyone other than the driver of the car, Berry Smith, Jr., was arrested for and charged with anything in connection with the speeding or reckless operation of the vehicle.

POINT VII

THE LOWER COURT DID NOT ERR IN OVERRULING APPELLANTS MOTION TO EXCLUDE THE TESTIMONY OF THE SHERIFF WITH RESPECT TO THE ARTICLES TESTIFIED TO.

As pointed out hereinabove, under Rose v. State, the appellants cannot complain of the search of an automobile not belonging to them nor under their control.

POINT VIII

THE LOWER COURT DID NOT ERR IN NOT PERMITTING PATROLMAN PUCKETT, ON CROSS-EXAMINATION, TO STATE WHY THE APPELLANTS WERE BEING ARRESTED.

The record shows that Patrolman Puckett arrested Berry Smith, Jr. and that Sheriff Waller arrested the appellants. The trial court very properly put a halt to the interrogation of Patrolman Puckett as to the charge under which Sheriff Waller arrested appellants since it is obvious from the record (R. 128-129) that Patrolman Puckett did not know the charge and his testimony with respect thereto was hearsay.

POINT IX

THE LOWER COURT DID NOT ERR IN OVERRULING THE MOTION OF APPELLANTS TO EXCLUDE THE ITEMS FOUND ON THE HIGHWAY.

As pointed out hereinabove, the lower court did exclude the gloves and cap, but did not exclude the pistol. The court properly allowed the pistol to be introduced in evidence since it was demonstrated that it fit the shoulder holster found in the car and the circumstance of it being found by the college student along the route where the officers had seen articles being thrown out of the car is sufficient to make it competent, relevant and material.

The fact that it could not possibly have been positively identified as belonging to one of appellants and the fact that it was found a short while after the incident can only go to the weight to be attached to this evidence by the jury. Further, as argued hereinabove, the prosecution was prejudiced when the trial judge excluded the gloves and cap erroneously.

CONCLUSION

In conclusion the appellants cite *Newton v. State*, 98 So. 2d 116, 232 Miss. 114. This case is clearly distinguishable from the case at bar. In the case at bar there was no evidence offered in defense. The hurling of objects out of the right hand windows of the car clearly indicates that someone other than Berry Smith, Jr., the driver, was exercising control over objects within the car. In the Newton case, Newton testified in his own defense and was his only witness. He told a story that exonerated him and which could not be overcome by the State. Under the rule of *Weathersby v. State*, 165 Miss. 207, 147 So. 481, 482, it was held that he must be discharged. In the case at bar we have no explanation from the appellants or anyone else to refute the strong case made out by the State.

Wherefore, it is respectfully submitted that there was ample evidence to justify the verdict of the jury and that

verdict and the judgment of the trial court should not be disturbed.

Respectfully submitted,

JOE T. PATTERSON, Attorney General

By

Assistant Attorney General

CERTIFICATE

I, G. Garland Lyell, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Brief of Appellee, State of Mississippi, to Honorable Earle L. Wingo, Attorney at Law, Hattiesburg, Mississippi.

This the 7th day of December, 1961.

Assistant Attorney General

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 41,948

WILLIAM L. HEAD and
J. M. CUMMINGS — Appellants

vs.

STATE OF MISSISIPPI — Appellee

SUGGESTION OF ERROR

Comes now the appellants, William L. Head and J. M. Cummings, and respectfully suggests to this Honorable Court that error was committed in the decision of the above styled and numbered cause rendered on January 22, 1962, as follows, to-wit:

I.

That the Court erred in failing to reverse the decision of the lower court for the reason that Sheriff Bob Waller was allowed to introduce certain alleged burglary tools found in the automobile owned by Berry Smith, Jr.

II.

That the Court erred in failing to reverse the lower court for the reason that the alleged burglary tools and articles picked up along the Highway were not identified as articles coming from the automobile in which appellants were passengers.

ARGUMENT

We seriously suggest that this Honorable Court erred in affirming the judgment of the lower court when we

first considered that at most, the proof of the State of Mississippi was that appellants, William L. Head and J. M. Cummings, were passengers in an automobile driven by Berry Smith, Jr., at the time when he was apprehended by the Sheriff of Forrest County, Mississippi, and other officers of the law on a charge of speeding. The record fails to show any evidence to the effect that the driver of the automobile, Berry Smith, Jr., and the two occupants of the automobile were on any joint mission for the purpose of violating the law, nor does the State offer any proof to the effect that the alleged burglary tools belonged to either passenger in the automobile owned by Smith. This Court is well aware of the established rule that articles of personal property are presumed to be owned by the person in whose possession they are found. Berry Smith was the owner of the automobile and the articles found in the car was certainly presumed to be his property.

We respectfully recite the case of Jack Newton vs. State, 98 So. 2d 116, in which said case the defendant was convicted of the possession of burglary tools and the Supreme Court, Chief Justice McGehee, held no evidence on which the case could have been submitted to the jury, except upon instruction directing verdict in defendant's favor. "In prosecution for possession of burglary tools, articles and instruments found in trunk of automobile which was owned by another and in which defendant was riding at time of his arrest, evidence showed that owner had had complete control and possession of automobile, and that contents therein belonged to him, and did not sustain conviction." This case was a reversal and the appellant discharged. There is no proof whatsoever in this record to the effect that either

passenger knew of the presence of the tools in the car. We seriously contend that it was the burden of the State of Mississippi to prove such in this case.

We therefore, respectfully submit and suggest that this Honorable Court erred in affirming the conviction of the lower court.

Respectfully Submitted,
/s/ Lawrence Arrington
Attorney for Appellants

CERTIFICATE

I, Lawrence D. Arrington, Attorney for Appellants hereby certify that the original of the above suggestion of error was on this date mailed, postage prepaid to Honorable Tom Q. Ellis, Clerk of the Supreme Court of the State of Mississippi, at his office in Jackson, Mississippi, and that a copy was mailed, postage prepaid to Honorable Joe T. Patterson, Attorney General, at his office in Jackson, Mississippi.

Witness My Signature, on this the 31st day of January, A. D., 1962.

/s/ Lawrence Arrington
Attorney for Appellants